

ORIGINAL

Case No. 2011-0742

IN THE SUPREME COURT OF OHIO

On Appeal from the Fifth District
Court of Appeals, Stark County, Ohio

Case No. 2010-CA-00124 & Case No. 2010-CA-00130

GRACE BURLINGAME, ET AL.,
Plaintiffs-Appellees,

v.

CITY OF CANTON, ET AL.,
Defendants-Appellants.

**MERIT BRIEF OF APPELLEE JOSEPH BURLINGAME,
ADMINISTRATOR OF THE ESTATE OF GRACE BURLINGAME**

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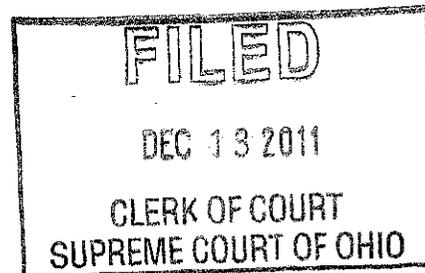
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STATEMENT OF THE CASE

The accident in the instant case occurred on July 4, 2007. On February 19, 2009, a Complaint was filed in Stark County Common Pleas Court by Grace Burlingame, a passenger and the sole survivor in Plaintiff-Appellee's vehicle. The Plaintiff/Appellee's husband, Dale Burlingame, was killed instantly. The Complaint named as Defendant/Appellants the City of Canton, James R. Coombs II, who is employed by the City of Canton's Fire Department and who was driving a fire truck involved in the accident, and the Estate of Dale Burlingame, the driver of Plaintiff/Appellee's vehicle. The Complaint alleges with regard to Defendant/Appellants the City of Canton and Coombs, that Defendant/Appellants James R. Coombs II's operation of the City of Canton's vehicle was wanton, willful and/or reckless.

On November 6, 2009, a Motion for Summary Judgment was filed by Defendant/Appellants Coombs and the City of Canton. Plaintiff/Appellee filed a response and Defendant/Appellants filed a reply. The Court granted summary judgment in favor of both Defendant/Appellants in an Entry dated April 23, 2010. Plaintiff/Appellee filed her Notice of Appeal with the Fifth District Court of Appeals on May 18, 2010. The Estate of Dale Burlingame filed its appeal on May 20, 2010.

The Fifth District Court of Appeals reversed the trial court finding that there was a genuine issue of material fact with regard to whether the conduct of Appellant Coombs was reckless. Pertinent to the propositions of law in the instant appeal, the Fifth District Court of Appeals, relying on *O'Toole v. Denihan* (2008)118 Ohio St.3d 374, 2008-Ohio-2574, found that "violations of traffic statutes and departmental policies are factors a jury may consider in determining whether Coombs' actions were reckless." Defendant/Appellant Coombs and the City of Canton appealed to this Court on May 4, 2011. Jurisdiction was accepted over the first

two propositions of law. Defendant/Appellants filed their merit brief on October 24, 2011. An amicus brief was filed by the Ohio Municipal League on October 20, 2011. Plaintiff/Appellees filed a stipulated extension of time within which to file their brief on November 17, 2011 making the same due on or before December 13, 2011.

STATEMENT OF FACTS

On July 4, 2007, Plaintiff/Appellee Grace Burlingame and her late husband, Dale Burlingame, were driving home from a picnic at their granddaughter's home. At 7:30 p.m., with Dale Burlingame behind the wheel of their vehicle, they stopped for a red light at the intersection of 18th St. N.W. and Cleveland Avenue in Canton, Ohio. (See Police Report, attached as "Exhibit A" to Plaintiff's response to Defendants' Motion for Summary Judgment).

On July 4, 2007, the fire station received a call at approximately 7:00 p.m. for a fire at a "vacant" house located on Hoover Place. (See James R. Coombs II Deposition, pg. 31). The fire truck was a pump truck weighing approximately 20,000-40,000 pounds. (See James R. Coombs II Deposition, pg. 8). Defendant/Appellant James R. Coombs II, hereinafter referred to as "Coombs", testified that he was the driver on the responding pump truck. (See James R. Coombs dep. pgs. 28, 29 and 30). Defendant/Appellant Coombs testified that as he exited the station, the fire truck's siren was working. Then, somewhere between 18th St. and 22nd St., the siren quit working and never worked again prior to the accident. Defendant/Appellant Coombs was assigned to the fire station at 25th and Cleveland Ave., Canton, Ohio and is familiar with the peculiar nature of this intersection as he had traveled through the intersection in question since being assigned to this station. (See James R Coombs dep. pg. 25). This intersection, 18th St. N.W. and Cleveland Avenue, N., is off-set and requires two traffic signals. Further, on the northwest corner of 18th St. N.W., there is a large funeral home which has two business signs, both of which are very close to the roadbed of Cleveland Avenue. The business signs totally

block the view of any driver stopped on 18th St. N.W. and looking for traffic heading in a Southerly direction on Cleveland Avenue. (See pictures of intersection attached as "Exhibit C" to Plaintiff's Response to Defendants' Motion for Summary Judgment).

An ambulance traveling with its siren activated and heading in a Southerly direction on Cleveland Ave. passed through the intersection while the Burlingame vehicle was stopped. (See James R. Coombs dep., pg. 59). A witness, Brooke James, who was driving a vehicle directly behind the Burlingame's vehicle on 18th Street, N.W., first saw that the traffic light was red. (See Affidavit of Brooke James attached as "Exhibit "B" to Plaintiff's Response to Defendants' Motion for Summary Judgment). Ms. James witnessed the traffic light change from red to green after the ambulance passed. She then witnessed the Burlingame vehicle move forward into the intersection on the green light. Dale Burlingame entered the intersection and was struck broadside by the Defendant/Appellant City of Canton's fire truck driven by the Defendant/Appellant Coombs. (See Affidavit of Brooke James attached as "Exhibit "B" to Plaintiff's Response to Defendants' Motion for Summary Judgment.) Because of the force of the collision, Dale Burlingame was killed instantly from serious injuries and Plaintiff/Appellee Grace Burlingame was life-flighted from the scene. Plaintiff/Appellee was hospitalized for several months and incurred over \$350,000 in medical bills. Plaintiff/Appellee Grace Burlingame never returned home and had to remain in a nursing facility with constant care. The question before the Common Pleas Court was whether the fire truck was operated in a wanton, willful and/or reckless manner by Defendant/Appellant Coombs.

The fire truck has three warning devices to use when responding to an emergency: 1) flashing lights, 2) siren, and 3) air horn. (See James R. Coombs dep., pg. 41). As Defendant/Appellant Coombs approached the intersection, he first saw the light for 18th and

Cleveland Ave. when it was **red**. Coombs testified that he is trained in the operation of the fire truck and that when responding to an emergency, and a driver comes to a traffic light that is red, a driver should slow down and come to a stop. (See James R. Coombs dep. pg. 43). Coombs then testified that a driver is then required to make sure all the lanes of traffic are clear before proceeding through. This can only be done after stopping and making sure that it is clear. (See James R. Coombs dep. pgs.43 and 44). This is also supported by the testimony of the Fire Department's training officer, Captain Michael Urick, hereinafter referred to as "Urick". (See Michael Urick dep., pg. 20, 23 and 24) The procedure manual also provides that if the light is red, then the emergency vehicle must come to a complete stop. ("Exhibit H", Canton Fire Department Policy Vehicle Operations/Security, "Exhibit I" and Driving Emergency Apparatus Standing Operating Procedures, "Exhibit J" attached to Plaintiff's Response to Defendants' Motion for Summary Judgment). The City of Canton provided the light sequence for the date of the accident at 18th Street, N.W. and Cleveland Ave. The light sequence shows that the preemtor was activated by the ambulance at 7:37 p.m. Then it shows a second activation occurring at 7:41 p.m. which is for the fire truck which was traveling behind the fire truck being driven by Defendant/Appellant Coombs. (See light sequence report is attached as "Exhibit F" to Plaintiff's Response to Defendants' Motion for Summary Judgment) The police report states that the crash had been reported at 1939 hours or 7:39 p.m. (See Police Report "Exhibit A" and James R. Coombs dep., pg. 71).

There is no evidence that, as the fire truck entered the intersection, the air horn was sounded. Defendant/Appellants argued that witness Brooke James heard the air horn and, therefore, she did not enter the intersection. Plaintiff/Appellees argued that what the witness Brooke James actually heard was the siren of the ambulance immediately before the accident

which had just proceeded through the intersection and then she heard the siren after the accident of another emergency vehicle approaching. This argument is based upon Brooke James' recorded statement that she gave, shortly after the accident, which stated: "Yeah, you heard like a constant siren because the ambulance had just come through and then you hear the other sirens coming." (See Brooke James Statement attached as "Exhibit E" to Plaintiff's Response to Defendants' Motion for Summary Judgment). The witness could not have heard a siren from the Defendants/Appellants' fire truck since it had no siren.

The trial court apparently resolved this disputed issue of fact contrary to Plaintiff/Appellee and in its Opinion, the trial court states: "A witness, who was directly behind Dale Burlingame at the intersection, stated that the *air horn* employed by the fire truck was so loud that she 'knew' a safety vehicle 'must be approaching the intersection' and she felt it would not be safe to proceed into the intersection." (Emphasis added).

In reality, a review of the evidence presented shows that the witness, Brooke James, never said she heard an "air horn". In fact in her recorded statement, Ms. James specifically states: "Yeah, you heard like a constant siren because the ambulance had just come through and then you hear the other sirens coming." (See James Statement, attached as "Exhibit E" to Plaintiff's Response to Defendants' Motion for Summary Judgment). The Plaintiff/Appellee asserts that Ms. James was hearing the continued siren of the ambulance and not the fire truck since it had no siren. This should have been resolved by a trier of fact and not the trial court which misstated the evidence.

A second question of fact exists -- whether Defendant/Appellant Coombs reduced his speed prior to the collision. The Canton Fire Department Policy Manual at Vehicle

Operations/Security states that during emergency responses, drivers of fire department vehicles shall bring the vehicle to a complete stop under any of the following circumstances:

- a. When directed by a law enforcement officer;
- b. Red traffic light;**
- c. Stop signs;
- d. Negative right-of-way intersections;**
- e. Blind intersections; and**
- f. When the driver cannot account for all lanes of traffic in an intersection.

(See Exhibit "I", attached to Plaintiff's Response to Defendants' Motion for Summary Judgment).

This policy is restated in the City of Canton Vehicle Policies and Procedures:

viii. When approaching a controlled intersection showing a stop sign, red or yellow traffic light, or any obstructed intersection, the vehicle operator will:

- (1) Reduce speed, take foot off accelerator and cover the brake pedal.
- (2) Change siren to a different mode, i.e. yelp or according to local practice.
- (3) Bring vehicle to a complete stop, make eye contact with the other vehicle operators, secure one lane at a time and proceed with Due Regard through the intersection and yield to other vehicles if warranted.

(See "Exhibit J" attached to Plaintiff's Response to Defendants' Motion for Summary Judgment).

Plaintiff/Appellee's expert, Robert C. Krause, Director of Emergency Services Consultants in Toledo, Ohio and the former Program Director of Toledo Fire and EMS Academy and current Chief of EMS in Toledo, Ohio, stated in his Affidavit:

I further state that the standard of care requires that emergency vehicle operators bring their vehicles to a complete stop when entering a controlled intersection

such as the one that I observed at Cleveland and 18th Street. It is further my opinion that when Captain Sacco and firefighter Coombs drove through the intersection of Cleveland and 18th, after observing that the light was red as they approached the intersection, they were in a direct violation of the Standing Operating Procedures of the City of Canton Fire Department, which states:

Section D: Driving Emergency Vehicles in Emergency Situations. ...when responding to emergencies and approaching intersections controlled by traffic signals, drivers shall approach such intersection with the apparatus under full control. If traffic light is red, drivers shall stop, assure intersection is clear, and then proceed with caution.

(“Exhibit K” attached to Plaintiff’s Response to Defendants’ Motion for Summary Judgment).

After leaving the stationhouse, Appellant Coombs told Captain Richard Sacco, who was also aboard the fire truck, that the siren was not working. Coombs was told by Captain Sacco that he was to slow down to road traffic and use the air horn more to let people know they were coming. (See James R. Coombs dep. pg. 42, Sacco dep. pgs. 34, 35 and 36). Coombs’ testified that he was going 35-40 mph down Cleveland Ave. when he saw the light was red. His Captain told him not to slow down until they reached the intersection. (See Sacco dep., pgs. 28, 34 and 36). There is no evidence on either the police report or the fire department’s report of any skid marks by the Defendant/Appellant. (See “Exhibits “A” and “D” to Plaintiff’s Response to Defendants’ Motion for Summary Judgment).

The facts in this case, if construed most favorably to Plaintiff/Appellee, were that Defendant/Appellant Coombs was heading to a fire at a vacant building when the siren on the truck stopped working. Despite the fact that Defendant/Appellant Coombs was traveling without a siren and the building in question was vacant, the operators of the fire truck did not slow down. Defendant/Appellant Coombs knew the intersection he was approaching was unusual and that the visibility was impaired. He did not slow for the intersection or stop at the red light even though this was his training and clearly stated in the Defendant/Appellant City of Canton’s

procedure manual. Appellants' vehicle weighed between 20,000 and 40,000 lbs. Defendant/Appellant Coombs proceeded into the intersection at 35-40 miles per hour. Defendant/Appellant Coombs disregarded a known risk—the risk that a car at the intersection would enter the intersection when its light had turned green. This risk was compounded by the weight of the vehicle and the rate of speed to come to a stop. The force at impact was deadly. In fact, there is no evidence that the brakes were ever applied. This method of operation was contrary to Defendant/Appellants' training, procedures and policy manuals, and in violation of Ohio statutes setting standards for operation of emergency vehicles on public roadways.

ARGUMENT

Appellee Joseph Burlingame, Administrator of the Estate of Grace Burlingame respectfully requests that this Court affirm the holding of the Fifth District Court of Appeals in *Grace Burlingame v. Estate of Dale Burlingame, et al*, 2011-Ohio-1325. The Fifth District Court of Appeals applied a totality of circumstances test which included evidence of violations of traffic statutes and internal departmental policies and procedures. The Court found that such statutes, policies and procedures were just one of the factors to be considered in the totality of the circumstances used to determine whether the conduct rose to the level of reckless, wanton or willful conduct under the immunity provisions of R.C. 2744. Appellee submits that this holding is in accord with existing law. Were this Court to accept Appellants' propositions of law, it would be promulgating a change to the current law by expanding the law to now limit the evidence that can be considered when determining whether conduct was reckless, wanton or willful, in a manner not contemplated by the statutory provisions of Revised Code Chapter 2744. Appellee has presented no compelling reasons for modifying existing law.

Accordingly, Appellee respectfully requests that this Court affirm the Fifth District Court of Appeals and adopt the alternate Propositions of Law posited by Appellee herein.

Appellants' First Proposition of Law states:

A violation of an internal department policy is not relevant to whether the actions of an employee of a political subdivision are willful, wanton, or reckless under R.C. 2744.

Appellee submits the following as an alternate Proposition of Law I:

The determination of whether conduct was reckless, wanton or willful under R.C. 2744 must be based upon the totality of the circumstances including, *inter alia*, whether the employee(s) violated a safety statute or policy or procedure intended to protect the public from harm.

A three-tiered analysis is used when determining whether a political subdivision is immune from liability under the doctrine of sovereign immunity. The first step in the analysis involves the application of the general rule that a political subdivision is immune from liability if the act or omission involved the performance of a governmental function. R.C. §2744.02(A)(1). In the next step, the exceptions to immunity are applied to determine if the conduct falls within one of the exceptions. If one of the exceptions set forth in R.C. §2744.02(B) applies, the political subdivision loses its immunity and may be held liable for the injuries sustained.

At issue in the instant case is whether Appellant Coombs' general immunity from liability for injury established in R.C. 2744.03(A)(6) is abolished pursuant to the following exception to employee immunity which provides that: "The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b). For the individual employees of political subdivisions, the immunity analysis differs slightly. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24. "Instead of the three-tiered analysis, R.C. 2744.03(A)(6) states that an employee is immune from liability unless the employee's actions or omissions are manifestly outside the scope of employment or the employee's official responsibilities, the employee's acts or omissions were malicious, in bad faith, or wanton or reckless, or liability is expressly imposed upon the employee by a section of the Revised Code." *Cater*, *supra*, citing *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946.

This holding comports with the Court's analysis of recklessness in *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705, wherein "reckless misconduct" is defined as follows:

The actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Thompson at 104-105, 559 N.E.2d at 708, quoting *2 Restatement of the Law 2d, Torts* (1965), at 587, Section 500. *Reynolds v. Oakwood* (1987), 38 Ohio App.3d 125, 127 528 N.E.2d 578.

The Thompson Court further expounded on the "totality of the circumstances test" stating, "[W]hether a person's conduct amounts to "wantonness" and "recklessness" is based upon the totality of the circumstances of the case – not facts considered in isolation. *Reynolds v. Oakwood* (1987), 38 Ohio App.3d 125, 127, 528 N.E.2d 578."

The foregoing totality of the circumstances approach was used by this Court this in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574 wherein the Court considered violations of relevant statutes and departmental policy in making its determination. In *O'Toole*, this Court explained that violations of agency policy could rise to the level of recklessness if the circumstances demonstrated a perverse disregard for the risks involved as follows:

Appellee's final attempt to maneuver around George-Munro's immunity status is based on the allegation that George-Munro violated various Ohio Administrative Code and CDCFS policies regarding investigations. Given our definition of "recklessness," a violation of various policies does not rise to the level of reckless conduct unless a claimant can establish that the violator acted with a perverse disregard of the risk. *** Without evidence of an accompanying knowledge that the violations "will in all probability result in injury," [*Fabrey v. McDonald Village Police Department* 70 Ohio St.3d at 356, 639 N.E.2d 31, evidence that policies have been violated demonstrates negligence at best.] *Id.* at 92.

Similarly, in an earlier decision, *Fabrey v. McDonald Village Police Department* (1994), 70 Ohio St.3d 351, the Court considered departmental policy in conjunction with a determination of

immunity in a suit for the death of an inmate who lit his mattress on fire and the conduct of the employee in charge, Chief Tyree as follows:

We approve and adopt the following analysis of the court of appeals when it considered the claim against defendant Chief Tyree:

[A]ppellant argues that Chief Tyree acted in a willful and wanton manner by knowingly failing to comply with the minimum jail standards promulgated by the state Department of Rehabilitation and Correction.

* * * There is no prohibition, in the standards, against permitting prisoners who do not present a threat to themselves or others to have smoking materials. Furthermore, appellee Tyree set forth the departmental policy on smoking in his deposition. Appellant has submitted no evidence as to how Riddle obtained the lighter. Appellants do not allege that Chief Tyree gave the ignition device to Riddle (arguably such behavior could be considered willful and wanton conduct, given Riddle's unstable condition at the time of incarceration). In the absence of this type of behavior, rather than mere allegations that Chief Tyree committed acts that could be considered *negligent* per se, the trial court correctly determined that summary judgment was appropriate on this issue. (Emphasis added.)

Although appellants argue that Tyree's failure to maintain certain safety devices in violation of the standards caused Fabrey's injuries, a review of the record reveals that Tyree's conduct, while arguably negligent, does not rise to the level of wanton misconduct. Tyree apparently did not anticipate that a prisoner, while locked in a cell, would intentionally set fire to his own mattress. The General Assembly has declared that Tyree's mere negligence in his official duties should not give rise to personal liability. This was properly within its authority. (*Fabrey* at pgs. 356 and 357)

Thus, the consideration of departmental policies and practices has support in precedent. Further, the admission of evidence of policies and practices when rendering a determination regarding immunity of employees operating emergency vehicles is not novel to the Fifth District Court of Appeals. In *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, a City of Columbus fireman was responding to an emergency call on a cold clear day. *Hunter*, 139 Ohio App.3d at 966. With lights and siren on, the fireman was traveling as fast as 61 mph in a 35 mph zone, 26 mph over the posted limit. *Id.* After approaching several stopped vehicles, the driver veered left of center in an effort to pass the stopped vehicles. *Id.* This maneuver violated Columbus Fire

Department policy which prohibited vehicles traveling left of center from exceeding the posted speed limit by 20 mph. *Id.* Ultimately, the fireman collided with a vehicle operator who was turning into a parking center. *Id.* The vehicle operator was killed. *Id.* The defendants moved for summary judgment based upon their belief that the Columbus fireman's conduct was not wanton or reckless. *Id.* at 965. The trial court agreed. *Id.* The matter proceeded to the Tenth District. *Id.*

On appeal, the Tenth District Court reversed the decision of the trial court. The Appellate Court stated:

[T]he circumstances are extreme enough that evaluation of whether the recklessness was great enough to be willful or wanton misconduct is a matter for the trier of fact. The fact that the lights and siren were on is, of course, a matter that can be considered by the jury in determining whether plaintiff proved wanton or reckless misconduct, but the driver's conduct must be **evaluated based upon all of the circumstances at the time he choose to veer into the wrong lane at the speed he was traveling.** *Hunter* at 968, emphasis added.

Appellees acknowledge that not all policies and procedures will be relevant to a determination of whether an employee's conduct rises to the level of reckless, wanton or willful, but to create a proposition of law which excludes all policies from consideration would result in an application of the facts of the case in isolation, without regard to what the employee knew of the risks associated with his conduct which should be based upon his training experience and conduct.. A determination of whether conduct is wanton or reckless specifically requires an analysis of the individual's appreciation of a known risk and perverse disregard for the consequences of disregarding that risk. The analysis requires inquiry into the individual's knowledge of what is a hazard or danger and what are the consequences if such hazard or danger is perversely disregarded. The training, policies and procedures applicable to that individual on that given day are all part of the totality of the circumstances in making this determination.

As a rationale for Appellants' proposition of law that policies and procedures are not

relevant and should not be considered, Appellants argue that considering internal policies and procedures could have a chilling effect on a municipality's willingness to pass stringent policies and procedures. Appellants' "chilling effect" argument is pure speculation and stems from the faulty premise that if there is no policy or procedure in place, then policies and procedures cannot become a factor in the determination of recklessness. Such an argument is without merit. Under existing law, a failure to create policies and procedures can create a dangerous circumstance relevant to a finding of recklessness. See *Cater v. Cleveland* (1998), 83 Ohio St.3d 24. In *Cater, supra*, this Court considered whether a municipality was immune from suit in its operation of a public pool. With regard to policies and procedures the *Cater* court states:

The fact that the city had no policy in place or training regarding 911 is appalling. The seriousness of these omissions is highlighted by the fact that more than one hundred swimmers, mostly children unaccompanied by adults, frequented the city pool that day. However, something as basic and important as dialing 911 was not within the city employees' grasp. Not only did two of the senior lifeguards create a dangerous situation by leaving the pool area during an open swim session, but the city, in its admitted failure to train its employees on the use of 911, left them without the knowledge necessary to handle the emergency as it arose. We are unwilling to grant immunity to the city under this provision, and to find, as argued, that the city did nothing wrong on the day Darrall suffered a near drowning.

This court has defined the term "reckless" to mean that the conduct was committed "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 96, 559 N.E.2d 699, 700, fn. 2, quoting 2 Restatement of the Law 2d, Torts (1965) 587, Section 500. The conduct by the city regarding its lack of training on the use of 911 presents a question of fact for the jury to consider, which was improperly disposed of by granting the city's motion for directed verdict. (*Cater* at pgs. 617 and 618).

Governmental agencies would be remiss if they failed to enact policies in an attempt to avoid introduction of a violation thereof as a factor in determining whether conduct is reckless wanton or willful under R.C. 2744 in light of the fact that this very failure can be considered evidence of

reckless or wanton conduct. The Appellants assert that by allowing the policies to be considered this would affect the fiscal integrity of the political subdivisions. Appellee argues that the comparison of the financial integrity of the municipalities' coffers versus the safety of the public is inconceivable. The Appellee maintains that the safety of the public should not be allowed to watered down at any cost. By allowing these policies to be considered as one factor in analyzing a person's conduct under the reckless/wanton standard, it would create a deterrent effect. If an employee is aware that a violation of these policies/procedures has a consequence, it will reinforce their importance in being followed and actually better protect the public.

The legislature did not give political subdivisions and their employees total immunity. It specifically provided exceptions to the immunity rule to ensure that if the conduct was wanton, willful or reckless the public would have recourse to pursue a claim against said political entity. By allowing these policies to be considered ensure that the subdivisions will have to properly train their employees on these policies which will actually enhance the safety of the public and possibly prevent another tragic accident involving a serious injury or death.

Finally, Appellants argue that the consideration of internal policies and procedures would result in inconsistent verdicts throughout the appellate districts because the internal policies promulgated by the various municipalities would be different. As support for this argument, Appellants argue by analogy rulings made by federal courts under 42 USC Section 1983 stating that "federal courts have no difficulty recognizing the difference between the standard for defining constitutional violations under Section 1983 and the role of departmental rules" and citing case authority which states that "1983 protects plaintiffs from constitutional violations, not violations of ... departmental regulations and police practices." (See Merit brief of Appellants' Coombs and City of Canton p.7.) Citing *Whren v. U.S.*, 517 U.S. 806 (1996), ("local police

practices are not relevant in that they vary from place to place and from time to time.”) they argue for an extension of this law into the analysis of immunity under R.C. 2744. Appellants’ argument is flawed, however, as the analysis under Section 1983 is one of “reasonable police conduct” and does not rely upon the subjective intent of the actor. Later in its decision, the *Whren* Court explained why local policies and practices weren’t relevant as follows:

Their principal basis--which applies equally to attempts to reach subjective intent through ostensibly objective means--is simply that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. See, e.g., *Robinson, supra*, at 236 ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed"); *Gustafson, supra*, at 266 (same). But even if our concern had been only an evidentiary one, petitioners' proposal would by no means assuage it. Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a "reasonable officer" would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable--an exercise that might be called virtual subjectivity. (*Whren* at pgs. 814 and 815)

Under R.C. 2744, the determination does not concern the “reasonableness of police conduct”. Rather, the actor’s subjective intent is critical to the court’s analysis of whether the conduct rises to the level of reckless, wanton or willful. Recklessness requires proof that the “violator acted with a perverse disregard of the risk” *O’Toole v. Denihan*, 118 Ohio St.3d 374, 386. Wantonness requires evidence manifesting a “disposition to perversity”. *Fabrey v. McDonald Police Department* (1994), 70 Ohio St. 3d 351, 356. Willfulness requires an “intent or design to injure”. *Zivitch v. Mentor Soccer Club, Inc.* (1998) 82 Ohio St.3d 367, 375. Such determinations cannot be made in a vacuum. The totality of the facts and circumstances surrounding the conduct must be permitted as evidence in order for the actor’s subjective intent to be fully explored. The “reasonable officer” standard would have more application in

reviewing the facts of the case under a negligent standard application rather than the reckless, wanton and willful standard.

The General Assembly did not provide for absolute immunity for public employees responding to emergencies. It balanced the need to protect the fiscal integrity of municipalities against the right of its citizens to obtain redress and created a very narrow exception to immunity where the conduct is wanton, reckless or willful. Neither R.C. 2744 nor the case precedent cited herein provide for the exclusion of policies and procedures in this analysis. Rather precedent from this Court suggests a “totality of the circumstances” test which permits the consideration of the violation of policies and procedures to test whether the actor perversely disregarded a known risk and the foreseeable consequences of his behavior. Appellants put forth no compelling argument for the creation of black letter law excluding evidence of violations of policies and procedures. Their “chilling effect” theory is pure speculation and contrary to the Court’s holding in *Cater, supra*. Similarly, Appellants’ theory that consideration of policies and practices will create inconsistent results is also without merit. Lastly, the reckless, wanton and willful standards are not analogous to the standards and analysis applicable to a case determined under 42 USC 1983.

Each case must be determined on its own unique facts and circumstances. Accordingly, Appellee requests that this Court affirm the holding of the Fifth District Court of Appeals in *Burlingame v. City of Canton*.

Proposition of Law II:

Proposition of Law II: A violation of traffic statutes is not relevant to whether the actions of an employee of a political subdivision are willful, wanton or reckless under R.C. 2744.

Appellees submit the following as an alternate Proposition of Law II: The determination of whether conduct was reckless, wanton, or willful under

R.C. 2744 must be based upon a totality of the circumstances, including, *inter alia*, whether the employee(s) violated a statute intended to protect the public from harm.

The statute which was violated by employee, Appellant Coombs, is R.C. 4511.03 which provides:

§4511.03 Emergency vehicles at red signal or stop sign.

(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with **due regard for the safety of all persons using the street or highway.** (Emphasis added.)

Also, applicable is R.C. §4511.041 which provides:

Sections 4511.12, 4511.13, 4511.131, 4511.132, 4511.14, 4511.15, 4511.202, 4511.21, 4511.211, 4511.22, 4511.23, 4511.25, 4511.26, 4511.27, 4511.28, 4511.29, 4511.30, 4511.31, 4511.32, 4511.33, 4511.34, 4511.35, 4511.36, 4511.37, 4511.38, 4511.39, 4511.40, 4511.41, 4511.42, 4511.43, 4511.431, 4511.432, 4511.44, 4511.441, 4511.57, 4511.58, 4511.59, 4511.60, 4511.61, 4511.62, 4511.66, 4511.68, 4511.681, and 4511.69 of the Revised Code do not apply to the driver of an emergency vehicle or public safety vehicle if the emergency vehicle or public safety vehicle oscillating light visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle and if the driver of the vehicle is giving an audible signal by siren, exhaust whistle, or bell. **This section does not relieve the driver of an emergency vehicle or public safety vehicle from the duty to drive with due regard for the safety of all persons and property upon the highway.** Effective Date: 05-20-1993. (Emphasis added)

Based upon the foregoing, operators of emergency vehicles have a duty to drive with due regard for the safety of others on the highway. Upon approaching a red or stop signal or any stop sign they are required to slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal provided they act with due regard for the safety of all persons using the street or highway. A violation of R.C. 4511.03 is not dispositive of the question of whether an employee's conduct was reckless, wanton or willful, (nor is anyone arguing that it should be) however, whether the employee complied with these standards is clearly relevant to

whether his conduct was reckless, wanton or willful. Especially, as in this case, where the undisputed facts are that the Appellant Coombs saw the traffic light was red and continued through the intersection with no siren and the evidence demonstrated that he did not slow down or stop the fire truck prior to entering the intersection. All that is proposed is that violations of traffic statutes be admissible as one factor that may be considered by a judge or jury in determining whether the employee's actions were reckless, wanton or willful.

Although Appellants argue that permitting such evidence will have dire consequences, Ohio courts have demonstrated an ability to consider evidence of statutory violations without placing undue emphasis on such violation or finding the violation determinative of the outcome of the case. For instance, the Second District Court of Appeals in *Fitzpatrick v. Spencer*, 2004-Ohio-1940 (OHCA2) considered evidence of a violation of R.C. 4511.03 in conjunction with whether an emergency vehicle was operated in a willful, wanton or reckless manner. The facts before the Court in *Fitzpatrick* were as follows:

Moraine Police Officer Jonathan Spencer responded to an alarm at a local drug store. He engaged the emergency lights on his City of Moraine police cruiser and traveled southbound on State Route 741. The Plaintiff, Judith Fitzpatrick, approached the intersection of State Route 741 and Dixie Drive from the west, on Dixie Drive. Each party's view of the other's vehicle was obstructed by a tractor-trailer and a Winnebago that were stopped in the left turn lane of eastbound Dixie Drive.

Here, the stories diverge. Fitzpatrick testified, via deposition, that she saw the stopped traffic but proceeded through the intersection in the through lane of eastbound Dixie Drive. She said that she did not see the emergency lights or hear any audible signal from Officer Spencer's cruiser until she entered the intersection and the collision occurred.

Officer Spencer testified, also via deposition, that as he approached the intersection he sounded the air horn on his cruiser several times, slowed down considerably, and made two brief stops. He testified that after determining that all traffic had halted, he pulled to the left and slowly went around vehicles stopped in the left-hand lane. Officer Spencer further testified that he stopped in the middle

of the intersection and sounded his air horn again before proceeding through the intersection.

Eyewitnesses provided conflicting statements about Officer Spencer's actions. Several witnesses stated that they heard Officer Spencer's air horn as he proceeded through the intersection. Three witnesses stated that they observed Officer Spencer slow down as he proceeded through the intersection. However, two witnesses stated that she did not hear the air horn at all, and one of those never saw Officer Spencer stop or slow down. In any event, Officer Spencer's and Fitzpatrick's vehicles collided and both were seriously injured. (*Fitzpatrick*, pgs. 1 and 2, ¶ 2-5)

The *Fitzpatrick* court explained the relationship between the immunity statute and R.C. 4511.03 stating,

[T]he duty of care for the operator of an emergency vehicle proceeding through an intersection against a traffic signal, codified in R.C. §4511.03, is that he/she must **'slow down as necessary for safety to traffic' and 'proceed cautiously past such signal with due regard for the safety of all persons** using the street or highway. *Parton v. Weilnau* (1959), 169 Ohio St. 145, 157. (Emphasis added) (*Fitzpatrick*, pg. 4, ¶ 16).

The *Fitzpatrick* court denied summary judgment on the issue of immunity as follows:

...simply taking some action is not enough to justify a grant of summary judgment. That resolution is also improper when the evidence differs as to what action was taken, as it does here. A jury may well find that the action Officer Spencer took, whatever that was, was sufficient. However, given the conflicting testimony, reasonable minds could disagree whether Officer Spencer's actions were reckless or wanton in relation to the duty imposed by R.C. §4511.03, and the issue is one properly determined by a jury. (*Fitzpatrick*, pg. 4, ¶ 21).

More recently in *Stevenson v. Prettyman*, 2011-Ohio-718 (OHCA8), the Eighth District Court of Appeals considered R.C. 4511.03 in conjunction with a motion for summary judgment under R.C. 2744. In *Stevenson*, the Plaintiff had filed a personal injury complaint against the city and Officer Prettyman alleging that Officer Prettyman injured her when his patrol car struck the vehicle in which she was a passenger. She claimed that Officer Prettyman acted "recklessly, and/or with willful and wanton disregard for the safety of others" because he was allegedly travelling without light or siren and failed to stop at a flashing red light. The court found:

Further, for purposes of summary judgment, we will construe the facts in Stevenson's favor—that Officer Prettyman did not stop at the red flashing light. Under R.C. 4511.03(A), however, he was permitted to do so, since he was on an emergency call—as long as he proceeded 'cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.' But this statute is not dispositive either. *Weber v. Haley* (May 1, 1998), 2d Dist. No. 97CA108 ("if an emergency vehicle driver wantonly violates the statute, immunity may not exist'). Again, we look to the totality of the circumstances. *Ybarra*, 2005-Ohio-2497, at ¶ 10.

Officer Prettyman averred that he proceeded cautiously into the intersection. We find it significant that Stevenson did not counter this fact in her affidavit. Nor does she even claim that he was traveling at a high rate of speed through the intersection, or even mention his speed at all. Thus, under the totality of the circumstances in this case, we conclude that even if Officer Prettyman did not have his lights and siren activated and proceeded through the red flashing light without stopping, he did so with caution, and thus did not fail 'to exercise any care whatsoever' so as to rise to the level of 'wanton misconduct.' We likewise find that because he proceeded with caution, his actions did not rise to the level of "reckless disregard of the safety of others. (*Stevenson* at ¶49-51)

Thus, it is apparent that courts can consider the violation of a safety statute as one of the factors and circumstances relevant to a determination of recklessness without making the violation dispositive of the issue. Similarly, juries could be instructed on the proper use of evidence of a violation of a traffic statute were the case to proceed to trial.

Appellee has offered no compelling reason why a new rule of evidence should be created specifically for purposes of expanding immunity under R.C. 2744. Accordingly, Appellee Joseph Burlingame, Administrator of the Estate of Grace Burlingame, respectfully requests that this Court adopt his alternate Proposition of Law II and hold that "the determination of whether conduct was reckless, wanton or willful under R.C. 2744 must be based upon the totality of the circumstances including, *inter alia*, whether the employee(s) violated a safety statute intended to protect the public from harm." This rule of law maintains the integrity of the immunity exclusion set forth in RC 2744 and is consistent with existing precedent which applies a "totality of the circumstances" test in determining what constitutes reckless, wanton or willful conduct.

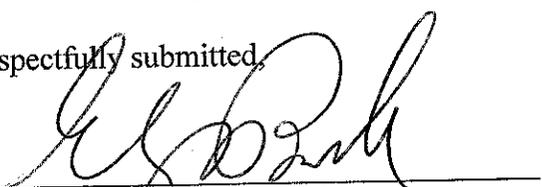
Conclusion

Appellee is here on a death cause involving a 20,000 pound fire truck going through a red light knowing it had no siren and failing to slow down or stop before entering the intersection. Immunity is not absolute. The Appellee is asking that not only should the facts be considered in determining whether the political subdivision employee acted recklessly, wanton or willful, but also one should be able to consider as part of this review the training manuals, training policies and applicable statutes also as factors in considering whether the employee's conduct arises to this standard and creates an exception to the immunity rule.

Application of totality of the circumstances does not permit isolation of certain facts and circumstances, rather it dictates that all facts and circumstances be considered in weighing the actor's conduct. Under Appellants' proposition, courts would be limited to the actor's own self-proclaimed knowledge of risks and consequences. The veracity of an employee who denies any knowledge of risk or consequences could not be explored as the policies, procedures and training of the employee would be deemed irrelevant and inadmissible. This judicially imposed isolation of the facts is a departure from current law and undermines the very essence of totality of the circumstances test. The actor's knowledge and appreciation of the risks and the dangers are necessary components to defining the nature of his conduct.

Accordingly, Appellee Joseph Burlingame, Administrator of the Estate of Grace Burlingame, respectfully requests that this Court affirm the decision of the Fifth District Court of Appeals and adopt its alternate Proposition of Laws I and II as proposed.

Respectfully submitted,

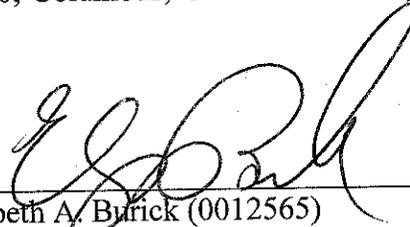


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330-456-3200 Facsimile: 330-456-7888
Attorney for Appellee, Joseph Burlingame
Administrator of the Estate of Grace Burlingame

CERTIFICATE OF SERVICE

A copy of the foregoing was sent by U.S. mail or hand delivered on this 13th day of December, 2011, to Attorney Orville L. Reed, III, Buckingham, Doolittle & Burroughs, LLP, 3800 Embassy Parkway, Suite 300, Akron, OH 44333-8332; Attys. Kristen Lea Bates-Aylward and Kevin L'Hommedieu, Canton Law Dept., Canton City Hall, 7th Fl., 218 Cleveland Ave., SW., Canton, OH 44702; Attorney Thomas J. Lombardi, 101 Central Plaza South, Canton, Ohio 44702; Stephen L. Byron and Rebecca K. Schaltenbrand, 4230 State Route 306, Ste. 240, Willoughby, OH 44094; John Gotherman, 175 S. Third Street, #510, Columbus, OH 43215-7100; Stephen J. Smith, 250 West Street, Columbus, OH 43215.



Elizabeth A. Burick (0012565)
Attorney for Appellee, Joseph Burlingame as the
Administrator of the Estate of Grace Burlingame

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

11 MAR 21 PM 2:43
NANCY S. PENNOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

GRACE BURLINGAME

Plaintiff-Appellant

-vs-

ESTATE OF DALE BURLINGAME,
ET AL

Defendants-Appellants

And

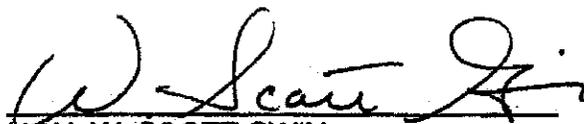
JAMES R. COOMBS, II., ET AL

Defendants-Appellees

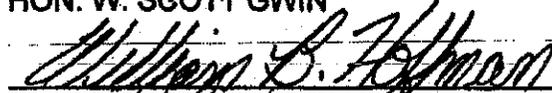
JUDGMENT ENTRY

CASE NO. 2010-CA-00124

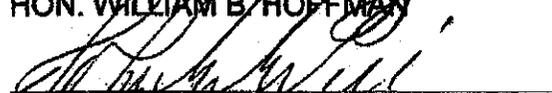
For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accordance with law and consistent with this opinion. Costs to appellees.



HON. W. SCOTT GWIN



HON. WILLIAM B. HOFFMAN



HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

11 MAR 21 PM 2:43
CLERK OF COURT
STARK COUNTY, OHIO
JANICE S. BENDIS

GRACE BURLINGAME

Plaintiff-Appellant

-vs-

ESTATE OF DALE BURLINGAME,
ET AL

Defendants-Appellants

JUDGMENT ENTRY

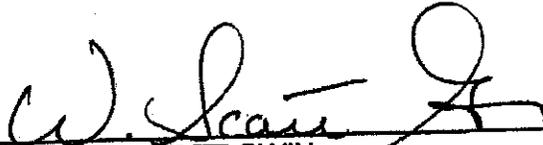
CASE NO. 2010-CA-00130

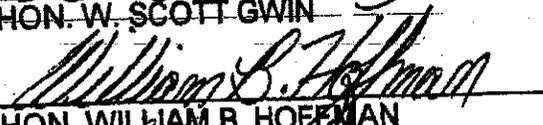
And

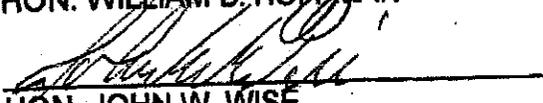
JAMES R. COOMBS, II., ET AL

Defendants-Appellees

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to appellees.


HON. W. SCOTT GWIN


HON. WILLIAM B. HOFFMAN


HON. JOHN W. WISE

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MAR 24 2011

GRACE BURLINGAME

Plaintiff-Appellant

-vs-

ESTATE OF DALE BURLINGAME,
ET AL

Defendants-Appellants

And

JAMES R. COOMBS, II., ET AL

Defendants-Appellees

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2010-CA-00124
2010-CA-00130

OPINION

11 MAR 21 PM 2:43

NANCY S. REINBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

CHARACTER OF PROCEEDING:

Civil appeal from the Stark County Court of
Common Pleas, Case No. 2009CV00689

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant, James Burlingame,
Administrator of Estate of Grace
Burlingame, Deceased

For Defendant-Appellee Canton City Fire
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A TRUE COPY TESTE:
NANCY S. REINBOLD, CLERK
By *[Signature]* Deputy
Date 3-21-2011

ENTERED BY-14

Gwin, P.J.

{¶1} Plaintiff-appellant Joseph Burlingame, as the representative of the Estate of Grace Burlingame, deceased, and defendant-appellant, Eva Finley, as the representative of the Estate of Dale Burlingame, deceased, appeal a summary judgment of the Court of Common Pleas of Stark County, Ohio, which found defendants-appellees the City of Canton and its employee James R. Coombs II are entitled to immunity from liability arising out of an accident between the decedent's vehicle and a Canton City fire truck. Appellant assigns a single error to the trial court:

{¶2} "I. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANTS/APPELLEES' MOTION FOR SUMMARY JUDGMENT AS REASONABLE MINDS COULD CONCLUDE THAT DEFENDANTS/APPELLEES OPERATED THE VEHICLE IN A WANTON, WILLFUL AND/OR RECKLESS MANNER."

{¶3} In the case before us, we are asked to decide whether appellees the City of Canton, and its employee James R. Coombs, II are entitled to immunity from liability in the operation of a fire truck that was involved in an accident with the decedent's van. For the reasons that follow, we hold that based upon the record of the case before us, reasonable minds could differ regarding whether they are.

{¶4} First, appellee the City of Canton has a complete defense to liability if, as the trial court found, the operation of the fire truck was not willful or wanton, and it was answering an emergency call. Similarly, the employees of the political subdivision such as appellee Coombs are also immune unless the employee's acts or omissions were done with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C.

2744.03 (A)(6)(b). Second, traffic statutes and departmental policies are factors a jury may consider in determining whether Coombs' actions were reckless. Accordingly, under the facts presented to the trial court, whether Coombs' conduct in the operation of the fire truck on July 4, 2007 rose to the level of willful or wanton is a genuine issue of material fact for a jury to decide.

{15} Accordingly, we reverse the judgment of the trial court.

I. Relevant Background

{16} On February 19, 2009, Grace Burlingame, filed suit seeking to recover money damages for the personal injuries that she suffered in a catastrophic collision that occurred on July 4, 2007 at the intersection of Cleveland Avenue and 18th Street, N.W. in the City of Canton. Burlingame named as Defendants, Joseph Burlingame, Executor of the Estate of Dale Burlingame, deceased, as well as the City of Canton, the Canton City Fire Department, James R. Coombs, II and Motorists Insurance Group.¹ Burlingame filed a cross-claim against the Canton City Fire Department, the City of Canton, James R. Coombs, II and the Canton City Fire Department seeking damages for the wrongful death of Dale Burlingame as a result of the accident of July 4, 2007. The City of Canton, James R. Coombs, II and the Canton City Fire Department filed an Answer to that cross-claim and included, among its affirmative defenses, that they were entitled to all the immunities, privileges and defenses granted to them pursuant to Chapter 2744 of the Ohio Revised Code. The City, Coombs and the Canton City Fire Department cross-claimed against the Estate of Dale Burlingame and claimed that they

¹ The claim against Motorists was that it should be required to set forth its subrogated claim to the extent that it had one.

were entitled to be indemnified for his alleged negligence. The City also sought to recover damages for the loss that it suffered to its fire truck.

{¶7} The trial court decided this case in appellees favor by summary judgment. We, therefore, construe the following facts from the record (which include depositions, transcripts, affidavits, pictures, accident reports and the pleadings) in the light most favorable to appellants. *O'Toole v. Denihan*, 118 Ohio St.3d 373, 889 N.E.2d 505, 2008-Ohio-2574 at ¶5. (Citing *State ex rel. Zimmerman v Tompkins* (1996), 75 Ohio St.3d 447, 448 663 N.E.2d 639).

{¶8} On July 4, 2007, Appellants Grace and Dale Burlingame were heading home after enjoying a family picnic at their granddaughter's house. On their route home, Appellants were stopped at the red light at 18th Street, N.W., and Cleveland Ave, N.W. in Canton. When his light turned green, Mr. Burlingame slowly pulled his vehicle into the intersection to make a left turn. (Affidavit of Brooke James, filed by the City of Canton and Coombs in support of their Motion for Summary Judgment). Almost immediately, the Burlingames' vehicle was violently struck by Appellees' 20-ton fire-truck traveling at 40 mph from a perpendicular direction. (Deposition of James R. Coombs, II at 46). Mr. Burlingame was killed instantly; Mrs. Burlingame sustained serious personal injuries and later died from those injuries.

{¶9} The traffic signals in Canton, like many other large cities, have a device known as a "preemption system," that overrides the usual traffic light pattern. When properly initiated, this system affords an emergency vehicle a favored status (green light) at an intersection. (Deposition of Douglas E. Serban, City of Canton, Electronic

Computer Specialist at 12; 13; Coombs at 32, 44, and 45). It is the siren that initiates the preemption system, not a horn or other device. (Serban at 19).

{¶10} Coombs, who was driving, immediately activated the fire trucks lights and siren after pulling out of the station. As he drove south on Cleveland Avenue, the siren stopped working just south of the 22nd Street intersection. When Coombs could not successfully reactivate the siren, Captain Rick Sacco who was in the passenger seat of the fire truck ordered Coombs to slow down and use the truck's air horn to alert motorists.

{¶11} Testimony was presented that the City of Canton had trained its firefighters to stop at red lights even when responding to emergency calls. (Deposition of Jerry Ward, firefighter with the City of Canton, City employee for 21 years at 9). In addition, the firefighters were trained that, if the siren malfunctioned during a run, to convert the emergency response into a non-emergency. (Ward, supra at 14). In the case at bar, Coombs continued to proceed in an emergency response mode in spite of the malfunctioning siren. (Ward, supra at 15).

{¶12} As Coombs approached the intersection on a red light, he could see the cross-traffic stopped on 18th Street. (Sacco at 51; 52). An ambulance traveling with its siren activated and headed south on Cleveland Avenue passed through the intersection while the Burlingames' vehicle was stopped at the red light. (Coombs deposition at 59). Brooke James the driver of the vehicle that was behind the Burlingames' van saw the traffic light turn from red to green after the ambulance passed.

{¶13} As he approached the intersection, Coombs sounded the truck's air horn and was traveling at a speed between 35 to 40 miles per hour. Coombs thought he saw

his traffic light turn green, however it did not. Coombs saw the van pull into the intersection and attempted to avoid hitting it by swerving left of center.

{¶14} Plaintiff's expert witness Robert Krause offered his opinion that Captain Sacco and firefighter Coombs knew or should have known that continuing an emergency response without their siren caused a substantial risk of harm to the general public. A second expert witness Steven Wolfe offered an opinion based upon his review, training and experience that Coombs' actions arise to the standard of willful, wanton and reckless conduct in the operation of the fire engine.

{¶15} The City of Canton, Canton Fire Department and James R. Coombs, II moved for summary judgment. The trial court found the evidence demonstrated that appellee Coombs' actions were negligent at best, and did not rise to the level of malicious purpose, bad faith or in a wanton and reckless manner. The court concluded appellee Coombs and the City of Canton had statutory immunity from the Burlingames' suit.

II. ANALYSIS

{¶16} The issue before us is whether there is a genuine issue of material fact on the issue of whether appellees are entitled to immunity under R.C. Chapter 2744.

{¶17} Subject to a few exceptions, R.C. 2744.02(A)(1) provides that political subdivisions are "not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Likewise, immunity is extended, with several exceptions, to employees of

political subdivisions under R.C. 2744.03(A)(6). *O'Toole v. Denihan*, supra, 118 Ohio St.3d at 381, 889 N.E.2d at 512-513, 2008-Ohio-2574 at ¶ 47.

{¶18} Additionally, R.C. 2744.02(A) immunizes political subdivisions from actions for personal injury or wrongful death except as provided in Division (B) of 2744.02. R.C. 2744.02(B)(1) provides that a political subdivision is liable for death or injuries resulting from the negligent operation of a motor vehicle by an employee of the political subdivision acting within the course of its employment. However, R.C. 2744.02(B)(1)(b) provides that it is a full defense to the liability imposed by R.C. 2744.02(B)(1) upon the City if a fire truck causes an accident while in progress to a place where a fire is in progress unless the operator of the vehicle was operating the vehicle in a willful or wanton manner. A political subdivision's employee² is also immune from liability for personal injury or wrongful death unless his operation of the emergency vehicle was performed with malicious purpose, in bad faith, or in a wanton or reckless manner.³

{¶19} Thus, the issue at the summary judgment stage is whether viewing the evidence most strongly in favor of the appellants, there is a genuine issue of material fact as to whether Coombs' conduct in the operation of the fire truck on July 4, 2007 was wanton or willful.

A. Standard of Review

{¶20} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C).

² Coombs, in the case at bar.

³ R.C. 2744.03(A)(6)(b).

{¶21} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶22} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46.

{¶23} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the

record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112,***.

{¶24} "The Supreme Court in *Dresher* went on to hold that when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Id.* at 276. (Emphasis added.)" *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶¶36-37, 40-42. (Parallel citations omitted.); *Egli v. Congress Lake Club* 5th Dist. No. 2009CA00216, 2010-Ohio-2444 at ¶¶ 24-26.

{¶25} In deciding whether there exists a genuine issue of fact, the evidence must be viewed in the nonmovant's favor. Civ.R. 56(C). Even the inferences to be drawn

from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123, 1127.

{¶26} Appellate review of summary judgments is *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35,506 N.E.2d 212. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court is found to support it, even if the trial court failed to consider those grounds. See *Dresher, supra*; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327; *Am. Fam. Ins. Co. v. Taylor*, Muskingum App. No. CT2010-0014, 2010-Ohio-2756 at 25-31.

B. RECKLESS, WILLFUL OR WANTON CONDUCT

{¶27} We turn to the issue of what constitutes willful, wanton, and reckless conduct under R.C. 2744.

{¶28} In *Brockman v. Bell* (1992), 78 Ohio App. 3d 508, 605 N.E. 2d 445, the First District Court of Appeals observed that civil liability for negligence is predicated upon injury caused by the failure to discharge a duty recognized in law and owed to the injured party. The existence of a duty depends on the foreseeability of the injury. The test for foreseeability is whether a reasonably prudent person, under the same or similar circumstances, should have anticipated that injury to another was the probable result of his performance or nonperformance of an act. As the probability increases that certain consequences will flow from certain conduct, the actor's conduct acquires the character

of intent and moves from negligence toward intentional wrongdoing. Thus, the court concluded, the terms "wanton," "willful" and "reckless," as used to describe tortious conduct, might best be defined at points on a continuum between negligence, which conveys the idea of inadvertence, and intentional misconduct.

{¶29} We observe that willful and wanton misconduct describe two distinct legal standards. *Gardner v. Ohio Valley Region Sports Car Club of Am.*, Franklin App. No. 01 AP-1280, 2002-Ohio-3556 at ¶11.

{¶30} Essentially, wanton misconduct is the failure to exercise any care. *Hunter v. City of Columbus* (2000), 139 Ohio App. 3d 962, 968, 746 N.E. 2d 246. Wanton misconduct has also been likened to conduct that manifests a "disposition to perversity." *Seymour v. New Bremen Speedway* (1971), 31 Ohio App.3d 141, 148, 509 N.E.2d 90, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 269 N.E.2d 420, paragraph two of the syllabus. "[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31, quoting *Roszman, supra*. See *Gardner v. Ohio Valley Region Sports Car Club of Am.*, Franklin App. No. 01 AP-1280, 2002-Ohio-3556 at ¶13.

{¶31} Willful misconduct involves "an intent, purpose, or design to injure." *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 375, 696 N.E.2d 201, quoting *McKinney v. Hartz & Restle Realtors, Inc.* (1987), 31 Ohio St.3d 244, 246, 510 N.E.2d 386. Willful misconduct is something more than negligence and it imports a more positive mental condition prompting an act than wanton misconduct. *Phillips v. Dayton*

Power & Light Co. (1994), 93 Ohio App.3d 111, 119, 637 N.E.2d 963, citing *Tighe v. Diamond* (1948), 149 Ohio St. 520, 526-527, 80 N.E.2d 122.

{¶32} In *Marchant v. Gouge*, this Court observed that wanton misconduct goes beyond mere negligence and requires the evidence to establish a disposition to perversity on the part of the tortfeasor such that the actor must be conscious that his conduct will in all probability result in injury. The "wanton or reckless misconduct" standard set forth in R.C. 2744.03(A)(6) and "willful or wanton misconduct" standard set forth in R.C. 2744.02(B)(1)(a) are functionally equivalent. 187 Ohio App.3d 551, 932 N.E.2d 960, 2010-Ohio-2273 at ¶ 32. (Citations and internal quotation marks omitted).

{¶33} In *Marchant*, supra we went on to observe that "willful misconduct" involves a more positive mental state prompting the injurious act than wanton misconduct, but the intention relates to the misconduct, not the result. We cited *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 which defined "willful misconduct" as "an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing some wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Id.* at ¶ 30, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520, 527, 37 O.O. 243, 80 N.E.2d 122. In *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 319, 662 N.E.2d 287, the Supreme Court defined the term "willful misconduct" as "the intent, purpose, or design to injure."

{¶34} The Supreme Court of Ohio has adopted the definition of reckless misconduct set forth in Restatement of the Law 2d, Torts (1965) 587, Section 500. *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 100, 559 N.E.2d 699, 704 at n.3.

Comments *f* and *g* to Section 500 of the Restatement of Torts 2d, *supra*, at 590, provide a concise analysis, which differentiates between the three mental states of tortious conduct with which we are confronted. The court in *Marchetti* cited to these comments with approval. They provide as follows:

{¶135} *f. Intentional misconduct and recklessness contrasted.* Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

{¶136} *g. Negligence and recklessness contrasted.* Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct

negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." See also *Marchant v. Gouge*, supra at ¶ 36.

{¶37} Appellants argue Coombs violated traffic law and departmental policies while driving the fire truck. R.C. 4511.03 is entitled "Emergency or public safety vehicles to proceed cautiously past red or stop signal" and provides:

{¶38} "(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway."

{¶39} The statute does not refer to use of sirens and flashing lights. It directs all emergency vehicles to slow down at red lights and stop signs.

{¶40} The trial court cited *Pelc v. Hartford Insurance Co.*, Stark App. No. 2003CA00162, 2003-Ohio-6021 as authority for the proposition immunity from civil liability is a separate issue from immunity under the traffic code. The court misstates our holding. In *Pelc*, we noted R.C.2744.02 gave immunity to the firefighter because he was responding to an emergency and because his actions were not willful or wanton. R.C. 4511.041 provides traffic laws do not apply to a driver of an emergency vehicle while responding to an emergency and gives immunity from prosecution for violating traffic laws. R.C. 4511.041 is a traffic law and does not provide immunity for civil liability for torts.

{¶41} In the case at bar, the trial court found violations of departmental regulations do not strip Coombs of immunity because a city regulation cannot override the state statute granting immunity. The court stated courts in Ohio have repeatedly found violations of internal departmental policies are not relevant to a finding of malice, bad faith or wanton or reckless manner, citing *Elass v. Crockett*, Summit App. No.22282, 2005-Ohio-2142; *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129, at paragraph 37; and *Rodgers v. DeRue* (1991), 75 Ohio App.3d 200, 598 N.E.2d 1312. In actuality, these cases all arose out of the Ninth District, and we do not agree. Violation of departmental policy or of traffic laws may be a factor for the jury to consider in determining whether the conduct of the defendants rose to the level of wanton or reckless.

{¶42} Appellee cites us to *O'Toole v. Denihan* 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505 as authority for the proposition a plaintiff cannot maneuver around political subdivision immunity by alleging violations of departmental policies or the Ohio Administrative Code.

{¶43} In *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 73, the Supreme Court noted that in the context of R.C. 2744.03(A) (6) (b), recklessness is a perverse disregard of a known risk. The *O'Toole* court held that violations of agency policy could rise to the level of recklessness if the circumstances demonstrate a perverse disregard for the risks involved. *Id.* at ¶ 92. The Court said:

{¶44} "Appellee's final attempt to maneuver around George-Munro's immunity status is based on the allegation that George-Munro violated various Ohio Administrative Code and CCDCFS policies regarding investigations. Given our

definition of "recklessness," a violation of various policies does not rise to the level of reckless conduct unless a claimant can establish that the violator acted with a perverse disregard of the risk. *** Without evidence of an accompanying knowledge that the violations "will in all probability result in injury," *Fabrey, [v. McDonald Village Police Department]* 70 Ohio St.3d at 356, 639 N.E.2d 31, evidence that policies have been violated demonstrates negligence at best. **** O'Toole at paragraph 92.

{¶45} The laws and policies are designed to make emergency responses safer for the public. However, they also exist for the protection of the firefighters, who already face serious personal risks in their day-to-day jobs, and who must not be further imperiled en route to their humanitarian roles. We find violations of traffic statutes and departmental policies are factors a jury may consider in determining whether Coombs' actions were reckless.

{¶46} The 2008 Fire Department Policy Vehicle Operations/ Security requires drivers of fire department vehicles to come to a complete stop: if directed by a law enforcement officer; for red traffic lights; for stop signs ; for negative right-of way intersections; for blind intersections; if the driver cannot account for all lanes of traffic in an intersection.

{¶47} The Canton Fire Department Policy Incident and Collision Investigation guidelines list collisions at intersections preventable if: the driver failed to completely stop at an intersection controlled by a red control device or stop sign; the driver failed to control speed so the vehicle could be stopped safely; the driver failed to check cross traffic and wait for all lanes of traffic to stop or clear before entering the intersection, even if the driver had the right of way; the driver pulled out into the face of oncoming

traffic; the driver collided with a vehicle making a turn; the driver collided with a vehicle making a turn in front of the city vehicle.

{¶48} Appellants urge from the above facts, reasonable minds could draw different conclusions regarding whether Coombs operated the fire truck recklessly.

{¶49} The question of whether a person has acted recklessly is almost always a question for the jury. *Hunter v. Columbus* (2000), 139 Ohio App. 962, 746 N.E. 2d 246, decided by the 10th District Court of Appeals. In *Hunter*, an emergency vehicle responding to an emergency call entered an intersection at 61 miles per hour in a 35 miles per hour zone. The court of appeals acknowledged the emergency vehicle operator's motives were humanitarian, but found nevertheless, he did not necessarily have immunity because the matter presented a genuine issue of fact to the jury. The *Hunter* case cited *Brockman v. Bell* (1992), 78 Ohio App. 3d 508, 605 N.E. 2d 445, arising out of the Eleventh District Court of Appeals, and *Ruth v. Jennings* (1999), 136 Ohio App. 3d 370, 736 N.E. 2d 917, arising out of the Twelfth District Court of Appeals. The *Bell* case involved a collision between an ambulance and a private vehicle, although *Ruth* concerned an excessive force to arrest situation. However, all three of the cases the *Hunter* court cited found resolution of the case was a matter for the jury.

{¶50} The Ohio Supreme Court has explained: negligence is mere inadvertence, incompetence, lack of skill, or failure to take precautions that would allow the person to cope with a possible or probable future emergency. Reckless consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The person does

not intend to cause the harm that results from it but realizes or, from known facts, should realize that there is a strong probability that harm may result, even though the person hopes or even expects that the conduct will prove harmless. Intentional misconduct occurs when the person intends to cause harm. *Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699, footnote 3, citing Comments *f* and *g* to Section 500 of the Restatement of Torts 2d.

{¶51} The spectrum of intent stretches from negligence, through reckless, to intentional, and there are no bright lines. It is a jury question where on the continuum the appellees' actions fall. We agree with the *Bell* court that the line between willful and wanton misconduct and ordinary negligence can be a very fine one, *Bell* at 517, citing *Osler v. Lorain* (1986), 28 Ohio St. 3d 345, 504 N.E. 2d 19; *Hawkins v. Ivy* (1977), 50 Ohio St. 2d 144, 363 N.E. 2d 367; *Tighe v. Diamond* (1948), 149 Ohio St. 520, 80 N.E. 2d 1122; and *Reynolds v. City of Oakwood* (1987), 38 Ohio App. 3d 125, 528 N.E. 2d 578. The *Reynolds* case arose out of the Second District Court of Appeals and dealt with a collision between a police car utilizing the siren and lights and a pedestrian vehicle.

{¶52} In *Hunter*, supra, the court of appeals noted each case must be evaluated on its particular facts, and the use of a siren and flashing lights is one factor a jury must consider. Whether the emergency vehicle has crossed left of center may be a factor, as is the speed at which an emergency vehicle is traveling, because it may exceed the reaction time of even an alert driver. *Id.*, at 970-971. The *Reynolds* court found use of a siren and flashing lights is not the sole determinative fact, and the court discussed tree-lined streets as possible impairments to visibility and audibility. *Id.* at 127.

{¶53} The question of whether conduct is reckless in the case at bar in relation to whether the probability of harm is great and known to the alleged tortfeasor requires a more substantial analysis. The city cites situations where emergency vehicle drivers were not found to be driving in a wanton or reckless manner, but each situation must be evaluated on its own unique facts. In this case, the circumstances are extreme enough that evaluation of whether the recklessness was great enough to be reckless or wanton misconduct is a matter for the trier of fact. The fact that the siren was not on is, of course, a matter that can be considered by the jury in determining whether appellants proved wanton or reckless misconduct, but the driver's conduct must be evaluated based upon all of the circumstances at the time he choose to continue into the intersection at the speed he was traveling.

{¶54} "It is assumed that twelve men know more of common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & Pennsylvania Railway. Co. v. Stout*, (1873) 84 U.S. (17 Wall.) 657,664. Justice Story was writing in defense of one of the foundations of the American system of justice: the Seventh Amendment to the United States Constitution. It provides:

{¶55} "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

{¶156} Although the Seventh Amendment is not directly applicable to the individual states, Ohio has guaranteed the right to jury trial in Section 5, Article I of the Ohio Constitution. Article I section 5 of the Ohio Constitution provides:

{¶157} "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

{¶158} Because the right to jury trial is a substantive fundamental right, any rule or statute curtailing that right must be examined under a microscope. For this reason, the Ohio Supreme Court has held that even if the facts of a given case are undisputed, if a jury could draw different conclusions from those facts, a summary judgment cannot be entered. *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The jury must decide questions of fact; the judge decides how the law applies to those facts. The judge must not weigh the credibility of the evidence and must not decide how much emphasis to put on any one piece of properly admitted evidence.

{¶159} Summary judgment can be an important tool to streamline what may become a lengthy process. It is intended to weed out those cases that have no merit, or those that can be resolved simply by applying the law. However, courts must not be in a rush to judgment and must carefully preserve the right of litigants to have a jury of their peers determine the facts of their case. Recently, the Ohio Supreme Court explained:

{¶160} "This right [to a jury] serves as one of the most fundamental and long-standing rights in our legal system, having derived originally from the Magna Carta. See *Cleveland Ry.v. Halliday Co.* (1933), 127 Ohio St. 278, 284, 188 N.E. 1. It was

"[d]esigned to prevent government oppression and to promote the fair resolution of factual issues." *Arrington v. Daimler Chrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, 21. As Thomas Jefferson stated, the right to trial by jury is "the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), reprinted in 15 *The Papers of Thomas Jefferson* (Boyd Ed.1958) 269.

{¶61} "However, the right is not absolute. See *Arrington* at 22. Section 5, Article I guarantees a right to a jury trial only for those causes of action in which the right existed in the common law when Section 5 was adopted. See *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, paragraph one of the syllabus. It is settled that the right applies to both negligence and intentional-tort actions. See *Arrington* at 24." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007 -Ohio- 6948, 880 N.E.2d 420.

{¶62} This case is far from over. Our holding here does not mean appellants recover; it just means they could have an opportunity to present their case to a jury who will decide whether Coombs was reckless. It means there are important issues yet to be decided.

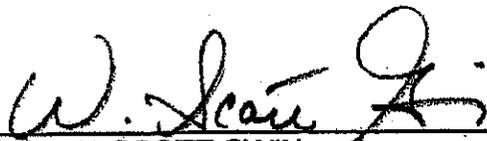
{¶63} We find the trial court erred in finding reasonable minds could not differ on this issue. Accordingly, the assignment of error is sustained.

{¶64} For the foregoing reasons the judgment of the Court of Common Pleas, Stark County, Ohio is reversed, and the cause is remanded for further proceedings in accordance with the law and consistent with this opinion.

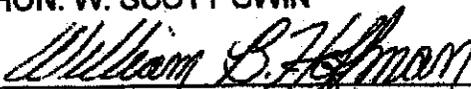
By Gwin, P.J.,

Hoffman, J., and

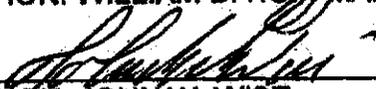
Wise, J., concur



HON. W. SCOTT GWIN



HON. WILLIAM B. HOFFMAN



HON. JOHN W. WISE

WSG:clw 0204

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

GRACE BURLINGAME

CASE NO. 2009 CV 00689

PLAINTIFF(S),

JUDGE FORCHIONE

VS.

JUDGMENT ENTRY

ESTATE OF DALE BURLINGAME, et al.,

DEFENDANT(S).

2010 APR 23 PM 12:4

CLERK OF COURTS
STARK COUNTY, OHIO

This matter is before the Court upon Defendants', City of Canton, ("Canton"), the Canton Fire Department, and James Coombs II, ("Coombs") Motion for Summary Judgment filed on November 6, 2009. Plaintiff filed her Response in Opposition on March 3, 2010. Defendants Canton and Coombs filed their Reply on March 17, 2010. Additionally, Defendant-Counterclaimant, the Estate of Dale Burlingame, ("Estate"), filed a Memorandum in Opposition on March 3, 2010.

Considering the pleadings, briefs of counsel and other supporting documents most strongly in favor of Plaintiff and Defendant-Counterclaimant Estate, the Court finds that a genuine issue of material fact does not exist and that Defendants Canton and Coombs are entitled to judgment as a matter of law.

The Ohio Supreme Court has clearly set forth the standard for summary judgment:

A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only there from, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

The inferences to be drawn from the underlying facts contained in the affidavits and other exhibits must be viewed in the light most favorable to the party opposing the motion, and if when so viewed reasonable minds can come to differing conclusions the motion should be overruled. *Hounshell v. American States Insurance Co.* (1981), 67 Ohio St.2d 427, 433. See also *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150.

Additionally the Ohio Supreme Court in *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 292 stated:

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When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The Court will note initially that Plaintiff has conceded that the Canton Fire Department is not an entity in and of itself and that Plaintiff voluntarily dismisses her claims against the Canton Fire Department.

The undisputed and relevant facts in this case are as follows: on July 4, 2007 at approximately 7:30 p.m., the Canton Police Department, and specifically James Coombs, Captain Sacco, and Jerry Ward, were responding to a structural fire at Hoover Place Northwest. Upon leaving the station at 25th St and Cleveland Ave Northwest, Coombs, who was driving, activated the lights and siren on the fire truck and proceeds south on Cleveland Ave. At some point prior to reaching the intersection of 18th and Cleveland Ave Northwest, the siren on the fire truck stops working. At that time, Coombs employs the air horn in conjunction with the siren to signal the fire truck's presence. Upon approaching the light at 18th and Cleveland, Coombs mistakenly believes that the preemptor system in place will turn his red light to green. At no time was the fire truck traveling at more than 40 miles per hour in a 35 miles per hour zone. Dale Burlingame, the first driver waiting at the light at 18th and Cleveland, but located eastbound on 18th St., slowly entered the intersection to turn north on Cleveland Ave. Coombs attempts to avoid hitting the van by swerving left of center, but collides with the driver's side of the van, killing the driver, Dale Burlingame, and severely injuring the passenger, Plaintiff in this matter. A witness, who was directly behind Dale Burlingame at the intersection, stated that the air horn employed by the fire truck was so loud that she "knew" a safety vehicle "must be approaching the intersection" and she felt that it would not be safe to proceed into said intersection.

Defendants Canton and Coombs move for summary judgment based on three arguments (discounting their initial argument regarding the Canton Fire Department, the claim against which

has been dismissed by Plaintiff): the claims alleging a violation of R.C. 4511.03 are not cognizable; because Coombs was responding to an emergency call, Defendants Canton and Coombs are immune from count two of Plaintiff's complaint alleging negligence; and, as no jury could find that Coombs acted with malicious purpose, in bad faith, or in a wanton or reckless manner, count three of Plaintiff's complaint and count two of Defendant Estate's cross-complaint must be dismissed.

In reading Plaintiff's Response in Opposition, it is clear to the Court that Plaintiff has incorporated her claims alleging a violation of R.C. 4511.03 into her argument regarding whether Coombs was responding to an emergency call. Therefore, the Court will address both these arguments together, along with the issue of whether Coombs acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

R.C. 2744.02(A)(1) provides that all political subdivisions in Ohio are provided immunity from civil liability "for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(B)(1) provides an exception to that immunity for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by the political subdivision's employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. However, an exception to the exception is made for a "member of a municipal corporation fire department" who was "operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm" and "where the operation of the vehicle did not constitute willful or wanton misconduct" under R.C. 2744.02(B)(1)(b). There is no language in the statute that would require the operation of the motor vehicle to involve the use of either emergency lights or siren, or both.

There clearly is no evidence to show that Coombs was responding to anything but a structural fire, or a "fire in progress", an emergency call as defined by R.C. 2744.02(B)(1)(b). Therefore, Defendant Canton is immune from any claims of negligence; Defendant Coombs can only be held liable if his "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

While Plaintiff makes much of the fact that Coombs was operating his fire truck in violation of R.C. 4511.03, R.C. 4511.041, and R.C. 4511.45, those sections are traffic statutes, not immunity statutes. This point has already been settled and the Fifth District Court of Appeals has specifically ruled that the issues of immunity from civil liability and immunity under the traffic code are two separate and distinct things. See *Pelc v. Hartford Fire Insurance* (2003), 2003 WL 22665987 (Ohio App. 5 Dist.), 2003-Ohio-6021.

Additionally, while Coombs may have violated departmental policy in regards to the operation of his siren-less fire truck, this violation of departmental policy in no way strips him or Canton of its immunity. Because the term "emergency call" for a firefighter is defined within R.C. 2744.02(B)(1)(b), any stricter definition used in a municipality's fire department regulations cannot override a statutory definition for statutory immunity purposes. *Horton v. City of Dayton* (1988), 53 Ohio App.3d 68. Furthermore, Courts in Ohio have repeatedly held that violations of internal departmental policy are not relevant to a finding of "malicious purpose, in bad faith, or in a wanton or reckless manner." See *Elsass v. Crockett*, 2005 WL 1026700 (Ohio App. 9 Dist), 2005-Ohio-2142, citing *Shalkhauser v. City of Medina* (2002), 148 Ohio App.3d 41. See also *Rodgers v. DeRue* (1991), 75 Ohio App.3d 200.

Accordingly, the Court turns to its inquiry as to whether Coombs' actions were with "malicious purpose, in bad faith, or in a wanton or reckless manner." "Malice" refers to a willful and intentional design to do injury. "Bad faith" connotes a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. "'Reckless' conduct refers to an act done with knowledge or reason to

know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that this risk is greater than that necessary to make the conduct negligent." *Shalkhauser*, Id at 50. "Reckless" can also be said to be a "perverse disregard of a known risk." *O'Toole v. Denihan* (2008), 118 Ohio St.3d 374, 386. "Although the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." Id. at 387, citing *Fabrey v. McDonald Village Police Department* (1994), 70 Ohio St.3d 351.

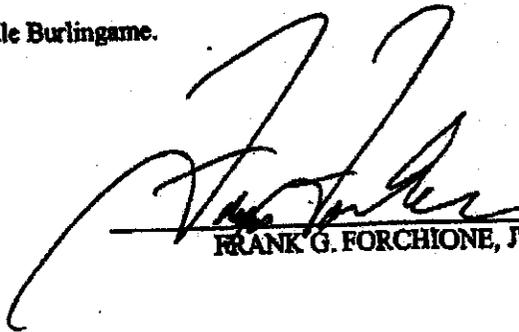
This accident took place during daylight hours, in clear weather, on dry pavement. Once Coombs realized that the siren on the fire truck did not work, he employed an air horn to alert other motorists and pedestrians to the fire truck's position. This air horn was loud enough to be heard clearly by the driver immediately behind the Burlingames. At all times, the fire truck was operating with functional emergency lights. Coombs was never going more than 5 miles per hour over the posted speed limit; Coombs believed that the preemptor would turn his light to green, allowing him to safely pass through the intersection. Ultimately, once Coombs realized that Dale Burlingame had driven into the intersection, he attempted to avoid hitting his vehicle by swerving left of center.

The results of this incident are a tragedy which this Court cannot overlook. It is easy to be influenced by the devastating loss this family has suffered as a result of Defendants' Canton and Coombs emergency response. Nor can the Court let sympathy or compassion cloud its interpretation of the law. However, the evidence demonstrates that Coombs' actions were negligent at best. The record fails to demonstrate any evidence that Coombs' actions rise to the level of malicious purpose, in bad faith, or in a wanton or reckless manner which would be required for this Court to deny Defendants' Canton and Coombs Motion for Summary Judgment.

The Court finds Defendants' Canton and Coombs arguments to be persuasive and that summary judgment is appropriate. The Court therefore GRANTS Defendants' Canton and Coombs Motion for Summary Judgment in its entirety.

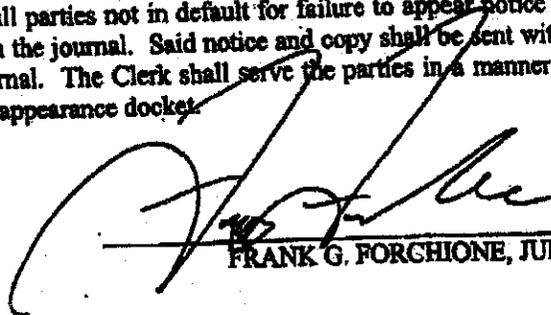
Accordingly, it is ORDERED, ADJUDGED, and DECREED that summary judgment is GRANTED in favor of Defendants City of Canton and James Coombs and against Plaintiff and Defendant- Counterclaimant Estate of Dale Burlingame.

IT IS SO ORDERED.


FRANK G. FORCHIONE, JUDGE

NOTICE TO THE CLERK - FINAL APPEALABLE ORDER

The Clerk of Courts shall serve upon all parties not in default for failure to appear notice and a copy of the judgment and its date of entry upon the journal. Said notice and copy shall be sent within three days of entering the judgment upon the journal. The Clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket.


FRANK G. FORCHIONE, JUDGE